KO Huts, Inc. *and* Michael Tiffany. Case 14–CA–164874

July 31, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On April 20, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S.Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint must be dismissed.[1]

[1] We therefore find no need to address other issues raised by the Respondent's exceptions.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 31, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kathy J. Talbott-Schehl, Esq., for the General Counsel.
Forrest T. Rhodes, Jr., Esq. (Foulston Siefkin LLP, Wichita, Kansas) for the Respondent.
Mark A. Potashnick, Esq. (Weinhaus & Potashnick), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was submitted to me on a stipulated record dated March 14, 2016. Michael Tiffany filed the charge giving rise to this matter on November 23, 2015. The General Counsel issued a complaint on February 16, 2016.

The issue in this case is whether Respondent violated Section 8(a)(1) of the Act by: requiring all prospective employees to sign as a condition of employment a document titled "KO Huts, Inc. Agreement to Arbitrate;" maintaining and enforcing this Agreement as a condition of employment; defending the Charging Party's class action lawsuit by moving to stay that proceeding and compel individual arbitration of his claims.

Essentially the issues herein are those considered by the Board in *D. R. Horton, Inc.,* 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed by the Board in *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

After considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Kansas corporation, which had an office in Wichita, Kansas and operates a number of Pizza Hut restaurants in Kansas and Oklahoma. In the 12 months ending January 31, 2016, Respondent derived gross revenues in excess of $500,000. It purchased and received goods valued in excess of

$50,000 directly from points outside of Kansas at its Kansas facilities. It purchased and received goods valued in excess of $50,000 directly from points outside of Oklahoma at its Oklahoma facilities. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent's employees are not represented by a labor organization.

II. ALLEGED UNFAIR LABOR PRACTICES

On May 26, 2015, Michael Tiffany, the Charging Party, completed and submitted new hire paperwork to Respondent, which included the following "Agreement to Arbitrate."

KO Huts, Inc. Agreement to Arbitrate

> KO Huts, Inc. (KOHI), on behalf of itself and its parents and affiliates, officers and directors (collectively, "KOHI") and I agree to use binding arbitration, instead of going to court, for any claims, including any claims now in existence or that may exist in the future (a) that I may have against KOHI, its affiliates, and/or their current or former employees or (b) that KOHI and/or its affiliates may have against me. Without limitation, such claims include any concerning wages, expense reimbursement, compensation, leave, employment (including, but not limited to, any claims concerning harassment, discrimination, or retaliation), conversion, breach of fiduciary duty, and/or termination of employment. This Agreement to Arbitrate shall *be* governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Nothing in this Agreement to Arbitrate shall prohibit me from filing, participating in, or pursuing action with an administrative agency in accordance with applicable law, including the filing of charges or claims with the National Labor Relations Board or the Equal Employment Opportunity Commission, or the filing of a workers' compensation claim or unemployment claim with an applicable state agency. In any arbitration, the American Arbitration Association ("AAA") will administer the arbitration, and the then prevailing employment dispute resolution rules of the American Arbitration Association will govern, except that (a) KOHI will pay the arbitrator's fees; (b) KOHI will pay the arbitration filing fee; and (c) as discussed below, the arbitration shall occur only as an individual action and not as a class, collective, representative, private attorney general action or consolidated action. The rules are available for review at www.adr.org or can be sent to you by the Home Office.
>
> KOHI and I agree that any and all claims subject to arbitration under this Agreement to Arbitrate may be instituted and arbitrated only in an individual capacity, and not on behalf of or as a part of any purported class, collective, representative, private attorney general action, or consolidated action (collectively referred to in this Agreement to Arbitrate as a ''Class Action"). Furthermore, KOH1 and I agree that neither party can initiate a Class Action in court or in arbitration in order to pursue any claims that are subject to arbitration under this Agreement to Arbitrate. Moreover, neither party can join a Class Action or participate as a member of a Class Action instituted by someone else in court or *in* arbitration in order to pursue any claims that are Subject to arbitration under this Agreement to Arbitrate. It is the parties' intent to the fullest extent permitted by law to waive any and all rights to the application of Class Action procedures or remedies with respect to all claims subject to this Agreement to Arbitrate. It is expressly agreed between KOHI and me that any arbitrator adjudicating claims under this Agreement to Arbitrate shall have no power or authority to adjudicate Class Action claims and proceedings. The waiver of Class Action claims and proceedings is an essential and material term of this Agreement to Arbitrate, and KOHI and I agree that if it is determined that it is prohibited or invalid under applicable law, then this entire Agreement to Arbitrate is unenforceable.
>
> All issues are for the arbitrator to decide, except that issues relating to arbitrability, the scope or enforceability of this Agreement to Arbitrate, or the validity, enforceability, and interpretation of its prohibitions of class and representative proceedings, shall be for a court of competent jurisdiction to decide.
>
> I acknowledge and agree that this Agreement to Arbitrate is made in exchange for my employment or continued employment, as well as the mutual promises to resolve disputes through arbitration contained in this Agreement. This Agreement to Arbitrate is not and shall not be construed to create any contract of employment, express or implied. This Agreement to Arbitrate does not in any way alter the "at-will" status of employment with KOHI, meaning that either I or KOHI may terminate the employment relationship at any time, with or without advance notice, and with or without cause.
>
> I understand that, by entering into this Agreement to Arbitrate, **I am waiving my right to a jury trial and any right I may have to bring any employment-related claim covered by this agreement as a Class Action (as defined herein) or any class or representative action** (either in court or in arbitration) **or to participate in such an action.**
>
> This Agreement to Arbitrate supersedes any and all prior agreements to arbitrate entered into between me and KOHI.

All prospective employees at Respondent's restaurants, including the Enid, Oklahoma restaurant were and are required to complete and sign new hire paperwork which includes the Agreement to Arbitrate. No applicant may be hired and no employee may retain employment without signing the Agreement to Arbitrate.

Respondent hired Michael Tiffany on or about May 26, 2015, as a delivery driver at its Enid, Oklahoma restaurant. On about July 10, 2015, Tiffany's position changed from delivery driver to dough preparer at the Enid restaurant.

On October 21, Michael Tiffany filed a collective civil action under the Federal Fair Labor Standards Act and a class action under the Oklahoma Minimum Wage Act against the Respondent in the United States District Court for the Western District of Oklahoma. He seeks to recover unpaid wages allegedly owed to himself and all similarly situated delivery driver employees by Respondent. The essence of Tiffany's claim is

that Respondent, by allegedly inadequately reimbursing him by mileage when delivering pizzas, in effect was paying him wages below the minimum wage.

Respondent filed an answer and counterclaim for declaratory judgment. It sought a proposed order staying Tiffany's lawsuit and compelling individual arbitration of his claims. Two days later, on November 19, 2015, Respondent filed a motion to compel arbitration and stay Tiffany's claims, relying on the fact that Tiffany signed its Arbitration Agreement. On April 15, 2016, the United States District Court granted KO Huts' motion to compel arbitration.

Analysis

The Board held in *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), and *D. R. Horton,* 357 NLRB 2277 (2012), that an employer which maintains a mandatory arbitration agreement that they would reasonably believe bars them from filing charges with the National Labor Relations Board and by maintaining and/or enforcing a mandatory arbitration agreement under which employees are compelled as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, has engaged in unfair labor practices affecting commerce within the meaning of the Act and has violated Section 8(a)(1) of the Act.

The Board also held that an employer, as did Respondent in this case, violates Section 8(a)(1) in seeking to dismiss a collective FLSA action and to compel individual arbitration, *Murphy Oil,* supra; *Cowabunga, Inc.,* 363 NLRB No. 133 (2016). The Charging Party, Michael Tiffany engaged in protected concerted activity by filing a collective civil action under the FLSA and the Oklahoma Minimum Wage Statute. This is so regardless of whether he consulted with other employees. The potential of his suit to initiate or to induce or prepare for group action renders his filing protected pursuant to Section 7, *Beyoglu,* 362 NLRB No. 152 (2015).

The Board's view regarding employer attempts to compel individual arbitration was rejected by the Fifth Circuit in *D. R. Horton v. NLRB,* 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.,* 808 F.3d 1013 (5th Cir. 2015), and also by the Second and Eighth Circuit Court of Appeals. In the *Murphy Oil* decision the Board reaffirmed its holding in *D. R. Horton* not withstanding its adverse reception in the courts of appeals. Footnote 17 of the *Murphy Oil* decision cites to case law holding that the Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties. Only the Supreme Court is authorized to interpret the Act with binding effect throughout the whole country. The Board is not obliged to accept the interpretation of any court of appeals.

Unless it has been reversed by the United States Supreme Court, Administrative Law Judges are required to apply Board precedent even when it conflicts with court of appeals decisions, *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984), *Arrow Flint Electric Co.,* 321 NLRB 1208 (1996). Therefore, I am obliged to apply *Murphy Oil* to the instant case and find that Respondent violated Section 8(a)(1) as alleged.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practice in cases involving unlawful litigation, I shall order the Respondent to reimburse the plaintiff for all reasonable expenses and legal fees, with interest,[1] incurred in opposing the Respondent's unlawful motion to dismiss his collective FLSA action and compel individual arbitration, I order Respondent to rescind or revise the Agreement, notify employees and the District Court that it has done so, and inform the District Court that it no longer opposes the plaintiff's claims on the basis of the Agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, KO Huts, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Binding Arbitration Agreement in all its forms, or revise it in all its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign the Agreement in any form that the Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the United States District Court that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss Michael Tiffany's FLSA collective action and to compel arbitration of his claims, and inform the court that it no longer opposes the plaintiff's FLSA action on the basis on those agreements.

(d) In the manner set forth in the remedy section of this decision, reimburse the plaintiff for any reasonable attorney's fees and litigation expenses that he may have incurred in opposing the Respondent's motion to dismiss his wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all its

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[1] Interest shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

facilities in Kansas and Oklahoma copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 20, 2016.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the Binding Arbitration Agreement in all its forms, or revise it in all its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class or collective actions in all forums.

WE WILL notify all applicants and current and former employees who were required to sign the Agreement in any form that the Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the United States District Court that we have rescinded or revised the mandatory arbitration agreements upon which we based our motion to dismiss Michael Tiffany's FLSA collective action and to compel arbitration of his claims, and inform the court that we no longer opposes the plaintiff's FLSA action on the basis on those agreements.

WE WILL reimburse Michael Tiffany for any reasonable attorney's fees and litigation expenses that he may have incurred in opposing our motion to dismiss his wage claim and compel individual arbitration.

KO HUTS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-160870 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."